KO KIN SAN & ORS.

v.

ONG LOK TONG & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[CIVIL SUIT NO. 24-1696 OF 1986]
19 MARCH 1989

CONTRACT: *Sale of shares - Payment by cheques - Tender of the cheques evidencing a complete contract enforceable by plaintiff - Drawer of cheque liable to be sued once it is dishonoured.*

The plaintiff and 1st defendant are shareholders and directors of one Teley Tyre Sdn. Bhd. By a document made on 15 September 1983, plaintiff agreed to sell and the 1st defendant agreed to buy over the plaintiffs' various shareholdings for RM30,000. For these shares, the 1st defendant tendered to the plaintiffs 3 cheques which were drawn by the 2nd defendant.

On 15 September 1983 the plaintiff executed a memorandum of transfer of the shares to the 1st defendant. However, when the cheques were presented for payment on their due dates, they were dishonoured. Plaintiffs commenced suit and their O. 14 application was dismissed by the learned Senior Assistant Registrar. The plaintiff appealed and contended that there was in existence a formal contract to buy shares by the 1st defendant. It was a contract to sell and not a conditional contract that it was subject to a 3rd party's willingness to buy.

Defendants' Counsel argued that there is no sale of the said shares by the plaintiffs to the 1st defendant. As a matter of fact, the defendant acted as agent for Kernol Industries and the transfer should be from the plaintiffs to Kernol Industries. Counsel submitted that it is for the Court to enquire into the circumstances of the sale negotiations which was abortive. Further there is no binding agreement as it is undated and unstamped.

Held:

[1] There is no shred of evidence to show that the sale was subject to subsale to a 3rd party i.e., Kernol Industries. And also there is no substance to the complaint of the defendants that the agreement was undated and unstamped. When the cheques' were tendered and payments were dishonoured, the plaintiffs can sue the drawer of them.

[2] The intention of the plaintiff was to sell these shares at a determined price. The clear and cogent evidence of the acceptance of the sale is the payment by the 1st defendant by the tender of the negotiable instrument in the form of those relevant cheques evidencing a complete contract enforceable by the plaintiffs in the event there was a breach.

[Appeal allowed with costs.]

Legislation referred to:
Rules of the High Court 1980, O. 14

For the plaintiffs - C.K. Tam; M/s. C.K. Tam & Co.
For the defendants - C.K.G. Pillay; M/s. Hassan Yunos & Co.

JUDGMENT

Abu Mansor Ali J:

This is an appeal against a decision of this Court allowing the appeal of the appellant against the decision of the learned Senior Assistant Registrar dismissing the plaintiff's O. 14 Rules of the High Court 1980 summons for final judgment of a sum of RM30,000.

The facts of the case are as follows. The plaintiffs are shareholders and directors of a company called Teley Tyre Sdn. Bhd. The 1st defendant is also a shareholder and director of the said company. The 2nd defendant is a drawer of 3 cheques subsequently dishonoured. By a document made on 15 September 1983 the plaintiffs say they had agreed to sell and the 1st defendant had agreed to buy for a total consideration of RM30,000 plaintiffs' various shareholding details of which are as follows:

Name	Respective Shares at RM1 per share	Selling price
1. Ko Kin San	25,000	RM10,000
2. Koh Kin Suey	25,000	RM10,000
3. Chee Shi Keng	25,000	RM10,000

For these shares, the 1st defendant tendered to the plaintiffs 3 cheques bearing various dates i.e., UMBC cheque no. 299139 dated 15 September 1983 for RM10,000, UMBC cheque no. 299140 dated 15 October 1983 for RM10,000 and UMBC cheque no. 299141 dated 15 November 1983 for RM10,000.

On 15 September the plaintiffs executed a memorandum of transfer in respect of these shares and delivered same to the 1st defendant. When the various cheques were presented for payment on their due dates, they were dishonoured by the bank for reason either 'payment stopped' or 'account closed'. Notices of dishonour were given to the 1st defendant. Despite repeated requests and notice by plaintiffs' solicitors, 1st defendant has failed or neglected to pay the said sum of RM30,000 or any part thereof.

The claim of the plaintiff against the 2nd defendant is for the sum of RM30,000 as the drawer of the above-mentioned cheques tendered to the plaintiffs by the 1st defendant. The said cheques were presented on due dates were dishonoured by the bank. Notice was also sent to the 2nd defendant notifying them of the dishonour.

By their summons-in-chambers dated 10 August 1987 the plaintiffs issued a summons to pray for final judgment. Their application was supported by affidavit and the defendant opposed the application after having filed affidavits in opposition. At the end of the matter before her, the learned Senior Assistant Registrar dismissed the summons.

Before us the plaintiffs contended there was in existence a formal contract to buy shares by the first defendant. They showed the Court it was not a conditional contract that it was subject to a 3rd party's willingness to buy. The contract was clearly evidenced by a contract to sell. Cheques were given by the 2nd defendant which contract was confirmed by the 1st defendant and witnessed by Lim Hon Chew, the secretary of the said company. It was not disputed that it was Lim who prepared the agreement to sell (document 'A').

Mr. C.K.G. Pillay for the defendants contended what is basic in O. 14 High Court Rules 1980 application there will be no final judgment if the defendant can raise an issue to be tried. Counsel contended there is in fact no sale of the said shares by the plaintiffs to the 1st defendant. He contended further that as a matter of fact, the defendant acted as agent for

Kernol Industries and the transfer if at all should be from the plaintiffs to Kernol Industries who might have put the chop 'cancelled' on transfer form 'YC3' of encl. (28). Counsel submitted it is for the Court to enquire into the circumstances of sale negotiation which was abortive. This is a matter which can only be decided at trial. As for the alleged agreement Exhibit 'A' defendant says it is not a binding agreement as it is undated and unstamped. So the issue that defendants have been able to raise, according to them are:

(i) was there an agreement? and

(ii) was there a sale?

After having heard arguments, I concluded there is no merit in the defendants' argument that there are triable issues on the ground that there was no agreement and there was no sale. As to the contention that the sale was subject to sub-sale to a third party Kernol Industries, I do not find any shred of evidence to that effect. Enclosure (13) Exhibit 'OLT1' in clear terms. It shows Kernol Industries having resolved on 22 August 1983 to buy 75% of shares in Teley Tyre Sdn. Bhd., for RM30,000. We need only refer to resolution of Teley Tyre dated 1 September 1983 attached to encl. (13) resolving the transfer plaintiffs' shares numbering 25,000 belonging to each plaintiff to Kernol Industries Sdn. Bhd. The plaintiffs' resignation as directors were duly accepted and the act of Mr. Ong Lok Tong (1st defendant) (director) and Mr. Yon Choi as director transferring the shares was a separate act of Teley Tyres. On no account did it detract from the clear evidence in Exhibit 'A' that the sale of the holdings of plaintiffs were to Mr. Ong Lok Tong (1st defendant).

I find instead that on the evidence before me especially Exhibit 'A' of encl. (9) there is clear evidence of an intention to sell those shares stated therein at a determined price by the plaintiffs to be paid in manner stated. The clear and cogent evidence of the acceptance of sale is the payment by the 1st defendant by the tender of the negotiable instrument in the form of those relevant cheques evidencing a complete contract enforceable by the plaintiffs in the event there was a breach. I find no substance in the complaint of the defendant that exhibit 'A' was undated and unstamped. As evidence of an agreement, I find it is effective as it stands. When the cheques were tendered and their payment were dishonoured, the plaintiffs can sue the drawer of them. The defendants not having any defence in the plaintiffs action for breach of contract to buy and also the defendants not having any defence for the dishonour of the negotiable instrument, I held that the defendants have no defence to this action. I therefore held that the appellant plaintiff had succeeded in the appeal and I therefore set aside the order of the learned Senior Assistant Registrar dismissing the plaintiffs' claim and I entered judgment for the plaintiffs as against the 1st and 2nd defendants as prayed with costs to be taxed.

Also found at [1990] 1 CLJ 295